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I-FLOW CORPORATION

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

I-FLOW Corporation, a Delaware corporation Plaintiff, v. Zone Medical LLC, a California limited liability company, Defendant.	Civil Action No. 08cv0057 DMS (NLS) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO CONSOLIDATE** Date: April 11, 2008 Time 1:30 p.m. Courtroom 10, 2nd Floor Honorable Dana M. Sabraw

Plaintiff I-Flow Corporation ("I-Flow") hereby moves to consolidate Case No. 08cv0057 DMS (NLS) (the "Zone Case") against Defendant Zone Medical, LLC ("Zone") and Case No. 07cv1200 DMS (NLS) (the "Apex Case") against Defendants Apex Medical Technologies, Inc. and Mark McGlothlin (referred to jointly as "APEX") Pursuant To Fed. R. Civ. P. 42(a).

I. SUMMARY OF ARGUMENT

The Zone Case and the Apex Case are related cases involving common questions of law and fact making the cases suitable for consolidation under Rule 42(a). Both cases involve I-Flow's U.S. Patent No. 5,284,481 (the '481 patent) and the SOLACE™ Post-Operative Pain Relief Infusion System ("Accused Solace Pump"). In this case, Zone is accused of selling and offering for sale the Accused Solace Pump that is made by APEX. Thus, the same '481 patent and the same accused product are at issue in both cases. The legal and factual issues will overlap. The claim construction issues will overlap. Moreover, the evidence presented at trial, both documentary and testimonial, will inevitably overlap.

No undue delay or prejudice will result from consolidating the causes of action. Zone will be able to raise its defenses and will have sufficient time to conduct discovery. Consolidation in no way prevents Zone from receiving a full and fair trial on the merits.

II. STATEMENT OF FACTS

I-Flow filed a patent infringement action against APEX for infringing the '481 patent by making, using, selling, and offering for sale the Accused Solace Pump. See Declaration of Boris Zelkind, Ex. 1. The Apex Case is currently progressing through claim construction discovery pursuant to the Patent Local Rules. Zelkind Decl., ¶ 3. Upon discovering that Zone was marketing the Accused Solace Pump, I-Flow promptly filed this patent infringement action, and filed a notice of related cases identifying the Apex Case as currently pending in this judicial district. In the complaint for patent infringement, I-Flow alleges that Zone markets the Accused Solace Pump that is made by APEX in violation of the '481 patent. Thus, the same patent, the '481 patent, is at issue in both of the related Zone and Apex Cases. Likewise, the same accused product, the Accused Solace Pump, is at issue in both cases. Zelkind Decl., ¶¶ 4-5.

The parties met and conferred regarding consolidating the related Zone and Apex Cases. I-Flow sought Zone's consent to file a joint motion to consolidate. Zone has refused to stipulate to consolidation of the related cases.[1] Zelkind Decl., ¶6.

III. ARGUMENT

A. The Related Zone And Apex Cases Should Be Consolidated Because They Involve Common Issues Of Law And Fact

Consolidation under Rule 42(a) is within the broad discretion of the court. *Investors Research, Co. v. United States Dist. Court,* 877 F.2d 777, 777 (9th Cir. 1989). A court may consolidate actions pending before it pursuant to Federal Rule of Civil Procedure 42(a) when they involve a "common question of law or fact:"

> If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.

Fed. R. Civ. P. 42(a). After determining that there are common questions of law and fact, the court must then "weigh[] the saving of time and effort consolidation would produce against any inconvenience, delay or expense that it would cause." *Huene v. United States,* 743 F.2d 703, 704 (9th Cir. 1984).

The related Zone and Apex Cases involve common issues of law and fact. They involve the same '481 patent, the same accused product and the same plaintiff. Two pending suits involving common questions of law and fact and involving the same plaintiff are apt candidates for consolidation. *Hanes Cos. v. Ronson,* 712 F.Supp. 1223, 1230 (M.D.N.C. 1988) (consolidating two cases filed by the same plaintiff finding consolidation "enhanced efficiency and economy for all concerned"). Consolidation is "particularly appropriate" where, as here, one plaintiff is suing multiple defendants for patent infringement. *Ovadia v.*

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[1] I-Flow was surprised by Zone's unwillingness to consent to a joint motion to consolidate. When the issue was raised during an informal telephonic conference with the Court on February 14, 2008, Zone argued that it was I-Flow's "strategy" to avoid consolidation and overly complicate the issues by pursuing multiple separate patent infringement lawsuits. This allegation was unfounded, and on the contrary, when I-Flow attempted to obtain Zone's consent to jointly seek consolidation, Zone refused.

Top Ten Jewelry Corp., 2005 WL 1337792, *1 (S.D.N.Y. June 6, 2005) ("Consolidation is particularly appropriate where, as in this case, the complaints contain nearly identical allegations, involve many of the same parties, and would not prejudice the plaintiff(s)"). Likewise, here, I-Flow is suing multiple defendants for patent infringement of the same patent.

Because both causes of action allege patent infringement of the same '481 patent by the same product, the cases involve common questions of law and fact. Common issues such as infringement, validity, and enforceability of the patent make patent cases particularly good candidates for consolidation. *See Cedars-Sinai Med. Ctr. v. Revlon, Inc.*, 111 F.R.D. 24, 32 (D. Del. 1986) (consolidating two cases involving distinct but "closely related" patents). Here, I-Flow alleges that Zone and APEX are infringing the '481 patent.

Moreover, both related cases involve the Accused Solace Pump. Zone is accused of infringing the '481 patent by selling the Accused Solace Pump, which is made by APEX. APEX is accused of infringing the '481 patent with the Accused Solace Pump in the related case. The issues addressing claim construction and infringement under 35 U.S.C. § 271 have significant overlap. Therefore, the two related patent infringement cases involve common questions of law and fact that support a motion to consolidate.

B. Interests Of Judicial Economy Favor Consolidation

Consolidation of the related Zone and Apex Cases serves judicial economy while not creating the potential for delay, confusion, and prejudice. As discussed above, a court weighs the interest in judicial economy against the potential for delay, confusion and prejudice caused by consolidation. *Monolithic Power Systems, Inc. v. O2 Micro Intern. Ltd.*, 2006 WL 2329466, *1 (N.D. Cal. 2006). Consolidation of the related Zone and Apex Cases will result in the conservation of judicial resources because both patent infringement cases involve the same patent, the same product, the same plaintiff and overlapping arguments of infringement, validity and enforceability. The similarity of the cases will result in significant overlap in the

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evidence, both documentary and testimonial. Therefore, the conservation of judicial resources that will result from conducting the Zone and Apex Cases together weighs heavily in favor of consolidation.

Zone will not be prejudiced and no undue delay will result from consolidation of the cases. Zone will have an opportunity to raise its defenses. Zone will have sufficient time to conduct discovery and prepare for a claim construction hearing. More importantly, Zone will receive a fair and impartial trial after consolidation. *See Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2nd Cir.1993) (in consolidation, court emphasized fairness over efficiency). Zone is entitled to and will receive a full and fair trial on the merits. Zone will have every opportunity to present its defenses to patent infringement in front of an impartial trier of fact. In addition, consolidation will avoid the risk of inconsistent or conflicting results. The fact that Zone will receive a fair and impartial trial and will not be prejudiced by consolidation supports I-Flow's Rule 42(a) motion.

IV. CONCLUSION

Judicial economy favors consolidating the related Zone and Apex Cases pending before this court. They involve the same patent, the same accused product and the same plaintiff. Therefore, I-Flow respectfully requests that the motion to consolidate be granted.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: March 6, 2008

By: s/Boris Zelkind
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Ali S. Razai

Attorneys for Plaintiff I-FLOW CORPORATION

PROOF OF SERVICE

I am a citizen of the United States of America and I am employed in San Diego, California. I am over the age of 18 and not a party to the within action. My business address is 550 West C Street, San Diego, California. On March 6, 2008, I caused **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO CONSOLIDATE** to be electronically filed with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to the following person(s):

Norbert Stahl, Esq.
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I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on March 6, 2008 at San Diego, California.

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